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OFFICE OF PETITIONS

In re Application of
Aaron M. Lamstein
Application No. 10/801,240
Filed: March 15, 2004
Attorney Docket No. 545.41

DECISION ON PETITION

This is decision on the petition filed on February 27, 2006, to withdraw the holding of abandonment, or in the alternative, a petition to revive the above-identified application pursuant to 37 CFR 1.137(b).

On April 18, 2005, petitioner filed a notice of appeal, which set a two-month extendable period to submit an appeal brief. In the apparent absence of a timely filed appeal brief, the application became abandoned on June 19, 2005. On December 20, 2005, the Office mailed a Notice of Abandonment.

In the present petition, petitioner asserted that he timely filed an appeal brief on April 15, 2005. In support of the petition, petitioner submitted the Declarations of Teri Nelmark and Michael E. Dergosits, a copy of petitioner's postcard receipt, and a copy of an appeal brief, bearing a certificate of mailing of April 15, 2005.

Initially, the Office notes that the postcard receipt does not bear a USPTO date-stamp. Therefore, the postcard receipt cannot serve as prima facie evidence of receipt of the appeal brief in the USPTO on April 15, 2005. *See MPEP 503*. The Office further notes that the certificate of mailing on the appeal brief indicates the following: "I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: **Box TTAB**, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on 4/15/05. By: Teri Nelmark." (emphasis added).

The USPTO file is the official record of the papers filed in this application. After reviewing the official file, the Office has not located the appeal brief submitted on April 15, 2005, among the application papers. A petitioner alleging that a paper was filed in the USPTO and later misplaced has the burden of proving the allegation by a preponderance of the evidence.

Pursuant to 37 CFR 1.8(a), the USPTO will consider correspondence, which is required to be filed in the Office within a set time period, as timely filed if the applicant complies with the procedures described in the following section. The actual date of receipt will be used for all other purposes.

(1) Correspondence will be considered as being timely filed if:

(i) The correspondence is mailed or transmitted prior to expiration of the set period of time by being:

(A) Addressed as set out in § 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail; or

(B) Transmitted by facsimile to the Patent and Trademark Office in accordance with § 1.6(d); and

(ii) The correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

As previously stated, petitioner certified that the appeal brief was addressed to Box TTAB, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450. However, the correct mailing address for all appeal briefs or other briefs under part 41 of title 37 of the Code of Federal Regulations (e.g., former 37 CFR 1.192) is:

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

See Special Mail Stops for Patent Mail, 1293 Off. Gaz. Pat. Office 28 (Apr. 5, 2005) (emphasis added).

In the present case, petitioner failed to comply with the procedures of 37 CFR 1.8 because petitioner did not mail the appeal brief to the correct USPTO mailing address on April 15, 2005, and therefore, cannot avail himself of the benefits bestowed by 37 CFR 1.8. Accordingly, the certificate of mailing indicated on the copy of the appeal brief will not be considered proof of prior filing or mailing under 37 CFR 1.8(b) because the correspondence was not mailed in accordance with 37 CFR 1.1. Moreover, the Declarations of Ms. Nelmark and Mr. Dergosits are no more persuasive of what was actually mailed than the contents of the official record.

As petitioner failed to submit sufficient documentary evidence to demonstrate that he timely filed an appeal brief in the USPTO, the petition to withdraw the holding of abandonment is **dismissed**.

As to the petition under 37 CFR 1.137(b), a grantable petition must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee (\$750.00 for a small entity), and (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition was unintentional. **The Director may require additional information where there is a question whether the delay was unintentional.**

Petitioner did not make a statement of unintentional delay pursuant to 37 CFR 1.137(b)(3) nor does the word "unintentional" appear anywhere in the petition. Petitioner is reminded to include the statement "the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional," even though petitioner included a statement of the facts concerning the delay. *See MPEP 711.03(c)(II)(C)(I)*.

As petitioner has not satisfied all of the requirements under 37 CFR 1.137(b), the petition to revive is **dismissed**.

If petitioner desires, petitioner may submit a request for reconsideration of this decision within **TWO (2) MONTHS** from the mail date of this decision. Extensions of time are permitted under 37 CFR 1.136(a). The request for reconsideration should include the omitted item(s) above and a cover letter entitled, Renewed Petition under 37 CFR 1.181 and/or 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By FAX: (571) 273-8300
 Attn: Office of Petitions

By hand: Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries related to this decision should be directed to the undersigned at (571) 272-3211.



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